Cascade General *and* Metal Trades Council of Portland & Vicinity and Pacific Coast Metal Trades District Council, AFL–CIO and Oil, Chemical and Atomic Workers Local 1-369, AFL–CIO, Party to the Contract. Case 36–CA–5660

July 5, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On November 28, 1990, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(2) of the Act, as alleged in the original complaint, by recognizing Oil, Chemical, and Atomic Workers Local 1-369, AFL–CIO (OCAW) as the exclusive bargaining representative of its employees, and by entering into a collective-bargaining agreement with OCAW, at a time when it did not employ a representative segment of its ultimate employee complement. We affirm the judge's finding for the following reasons, in addition to those discussed by the judge.

The Respondent extended recognition to OCAW on July 31, 1987,[3] during a pay period when only 16 individuals (including 2 stipulated supervisors) were on the payroll. The judge found that, in mid-to-late July, the Respondent had been informed that its bid for the assets of Dillingham Ship Repair had been accepted.[4] The amount of the bid was $1.6 million, of which approximately $1 million was for inventory and $600,000 was for tools and equipment. The Dillingham assets together were approximately four times the size of the assets previously owned by the Respondent.

Upon learning that it had achieved success in bidding for the Dillingham assets, the Respondent began negotiating with the Port of Portland to take over the facilities on Swan Island that previously had been occupied by Dillingham.[5] Although incorrect in its initial belief that it could assume the leases on those facilities on the same terms as those enjoyed by Dillingham, the Respondent nevertheless quickly secured permission to begin to operate out of the Swan Island facilities. In mid-August the Respondent received a proposal from the Port for a month-to-month lease on those facilities, and began leasing the facilities on that basis in September. The Swan Island facilities, which comprised some 90 percent of Dillingham's former leasehold, were several times larger than those originally occupied by the Respondent.

The Respondent's president, Kahler, who had previously been employed by Dillingham, testified that Dillingham's normal employment level had been roughly 600 employees, including 350 to 400 represented by the Metal Trades Council (the Charging Party).[6] Kahler also conceded that the Respondent could not even have paid the rent on its original, smaller facility—let alone at Swan Island—if it had continued to employ only 10 employees.[7] He further admitted that the Respondent projected hiring from 600 to 800 employees after it purchased the Dillingham assets, in order to pay the mortgage on the purchase.[8]

Against this backdrop, we agree with the judge that, when the Respondent recognized OCAW on July 31, it did not employ a representative complement of the work force it anticipated employing in its soon-to-be-expanded facilities. Thus, on that date, the Respondent knew that its bid for the Dillingham assets had been

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent excepts to the judge's ruling on the first day of the hearing, allowing the General Counsel to amend the complaint to add an allegation that the card check relied on by the Respondent in granting recognition to OCAW Local 1-369 was invalid because of the involvement and participation of the Respondent's supervisors in the card check. The Respondent also excepts to the judge's finding that the card check was tainted, as alleged. Because of our disposition of the case on other grounds, we need not pass on the merits of either of these exceptions.

The judge concluded that the Respondent's recognition of OCAW was unlawful for the additional reason that the Respondent did not authenticate the signatures on the cards. We disavow that conclusion. An employer's recognition of a majority union is not rendered unlawful simply because the employer does not authenticate the cards. *Windsor Place Corp.*, 276 NLRB 445 fn. 1 (1985). In the instant case, 7 of the 10 card signers testified at the hearing and verified their signatures.

[3] Unless otherwise noted, all dates are in 1987.

[4] The estimated date apparently is based on the testimony of the Respondent's vice president for finance, Ernest Brawley. Loy Kahler, the Respondent's president, testified that the bid was accepted in mid-July.

[5] On July 31, the Respondent wrote to the U.S. Navy's Pacific Military Sealift Command, in an effort to be placed on the latter's list of bidders. In that letter, the Respondent represented that it had purchased the Dillingham assets and that ''Our operations department will be located at the Dillingham facility at Swan Island.''

[6] Kahler stated that Dillingham's employment level varied from as low as 10 to 15 to as many as 1700 employees.

Kahler also testified that the Respondent had the ability to employ 600 people with the equipment it had before the purchase of the Dillingham assets, plus what it could have rented and leased. The Respondent's employment records establish, however, that at no time between July 1986 and September 1987 did it ever employ anything even approaching 600 people; the employment level during that period reached a maximum of 118 in May 1987, and did not otherwise exceed 100.

[7] Ten individuals signed OCAW authorization cards.

[8] Kahler stated that the only other option was to liquidate, but that that was not the Respondent's intention when it bought the assets.

accepted, and had reason to believe that it would reach a satisfactory lease arrangement with the Port for the Swan Island facilities previously occupied by Dillingham.[9] The new assets, deployed in the Swan Island facilities, had by Kahler's admission supported a ''normal'' employment level in the hundreds. Moreover—again by Kahler's admission—it was necessary, and the Respondent planned, to expand its level of work and employment many times in order to pay off the loan for the newly purchased assets.[10] By contrast, the amount of work justifying the low level of employment in late July would not even have generated enough revenue to pay the rent on the Respondent's then-existing facility, much less on the larger facilities on Swan Island which the Respondent planned to occupy. In these circumstances, even if the few individuals employed in late July represented many or even most of the crafts involved in ship repair, the level of employment at that time is incompatible with a finding that the Respondent was in substantially normal production, as that term would apply to its expanding operations.[11]

In so finding, we fully appreciate the fact that the Respondent's employment level fluctuates considerably overtime, rising and falling significantly even from week to week as the amount of work it is able to secure increases or decreases. We also are aware that, because of the inherent uncertainty regarding the number and magnitude of future contracts, it is virtually impossible for the Respondent to make accurate predictions of its actual future levels of employment.[12] Our decision, however, is based not on the Respondent's ability to predict accurately its future hiring levels, but on its plan—in existence at the time it recognized OCAW—to expand its operations to require, in normal times, levels of employment many times greater than the size of its work force at the time of recognition.[13]

[9] Indeed, the Respondent on that date affirmatively represented to the Navy that its operations would be at Swan Island. Moreover, as the judge observed, although final agreement on lease terms was not reached until later, there is no indication that the port, as lessor, *would* have benefited by allowing its facilities to remain unoccupied.

[10] As the judge noted, the departure of Dillingham from the Port of Portland would logically have foretold increased opportunities for the remaining employers in the local ship repair industry, including the Respondent.

[11] See *Hayes Coal Co.*, 197 NLRB 1162, 1163 (1972).

[12] However, employers who are faced with a demand for initial recognition, such as the Respondent, with significantly fluctuating levels of employment, need not face the difficult task of discerning whether any relatively small number of employees will be found to be a representative complement. Any employer, even one faced with clear evidence of a card majority, has the right to invoke Board processes to determine whether an election should be held and, if so, whether its employees desire union representation, provided it has not engaged in unfair labor practices that impair the election process. *Linden Lumber v. NLRB*, 419 U.S. 301, 310 (1974). Such an employer, if faced with a demand for recognition, may lawfully refuse recognition; if the employer or union then petitions for an election, the Board will determine whether a representative complement exists, without risk to the employer.

[13] Nor do we rely on the mere possibility, in late July, that future conditions might warrant a hiring increase, or on the fact, standing alone, that employment levels did greatly increase after the move to Swan Island. See *Hayes Coal Co.*, supra at 1163.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below[14] and orders that the Respondent, Cascade General, Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Maintaining or giving any force and effect to the collective-bargaining agreement between Respondent and OCAW dated September 24, 1987, or any renewal, extension, modification or supplement thereof; provided, however, that nothing in this Order shall require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to those agreements.''

2. Substitute the attached notice for that of the administrative law judge.

[14] We find no merit to any of the exceptions to the judge's recommended Order, which we find consistent with orders issued in similar cases. We shall, however, delete from the Order and notice the statement that nothing therein authorizes the Respondent to withdraw terms or conditions of employment that may have been established pursuant to its collective-bargaining agreement with OCAW. See *R.J.E. Leasing Corp.*, 262 NLRB 373 (1982).

In affirming the judge's order requiring the Respondent to reimburse employees for union dues, fees, assessments, and other payments that may have been exacted from them pursuant to the union security provisions of the collective-bargaining agreement, we emphasize that the Respondent need not reimburse any employees who voluntarily joined OCAW before September 24, 1987, the date the contract became effective. See *A.M.A. Leasing*, 283 NLRB 1017, 1025 (1987).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT assist or contribute support to OCAW, by recognizing or contracting with that labor organization as the exclusive collective-bargaining representative of our employees unless and until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT give effect to our September 24, 1987 contract with OCAW, or to any renewal, extension, modification or supplement thereof, but we are not required to withdraw or eliminate any wage rates or other benefits, terms or conditions of employment which we have given to our employees under such contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reimburse all our employees, former and present, for initiation fees, dues, assessments and other moneys unlawfully exacted from them under the contract with OCAW.

CASCADE GENERAL

Eduardo Escamilla, for the General Counsel.
Wayne D. Landsverk, of Portland, Oregon, for the Respondent.
Stephen (Steve) Cuddy, of Seattle, Washington, for the Charging Party.
John W. McKendree, of Denver, Colorado, for Party to the Contract.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Portland, Oregon, over a course of 16 trial days spanning February 7 to July 26, 1989, inclusive. The charge was filed September 9, 1987, by Metal Trades Council of Portland & Vicinity and Pacific Coast Metal Trades District Council, AFL–CIO (Charging Party or MTC (Portland entity only)). The complaint issued November 30, 1987.

This case comprises three principal issues; one procedural and two substantive. The procedural issue is whether General Counsel's motion to amend the complaint, as made on the first day of hearing, was providently granted. The original substantive issue of the case is whether Cascade General (Respondent or Cascade General) validly granted recognition and entered into a collective-bargaining agreement with Oil, Chemical and Atomic Workers Local 1-369, AFL–CIO, called Party to the Contract or OCAW where convenient for brevity, at a time when it did not yet employ a representative segment of its ultimate employee complement, in violation of Section 8(a)(1) and (2) of the National Labor Relations Act. The second and later substantive issue, as topic of the amendment, is whether any of 10 individuals are supervisors within the meaning of Section 2(11) of the Act, and if so, whether individually or in any combination, they participated in, or themselves constituted, a showing of interest among persons employed by Respondent, so as to nullify the validity of recognition for collective-bargaining purposes being extended in this context and on this basis.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by General Counsel, Respondent and Party to the Contract, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Oregon corporation with an office and place of business in Portland, Oregon, where it engages in ship repair. In the course and conduct of its business operations Respondent annually has gross sales in excess of $500,000, while purchasing and receiving goods and materials valued in excess of $50,000 directly from sources outside Oregon, or from suppliers within the State which in turn obtained such goods and materials directly from sources outside Oregon. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and, as also admitted, that MTC and OCAW are each a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Case Background*

1. Port of Portland

At a point off the Columbia River about 100 miles inland from the Pacific Ocean, the Port of Portland maintains a principal facility on the northward-flowing Willamette River as an integral part of the business and industry existing in metropolitan Portland, Oregon. The Port is a public entity comprised of a nine-member commission. It actually has three major operating areas, one of which is the Portland Ship Repair Yard located on Swan Island in the Willamette River. Swan Island is considered an industrial park where, along with the shipyard itself, module construction and general marine activities, there is even unrelated manufacturing taking place. The Ship Repair Yard operates as a uniquely combined public-private facility. There are dry docks, berthing areas, yards, and general equipment on Swan Island, constituting it a major West Coast ship repair location. Other Port of Portland functions, none of which are involved in this proceeding but stated for context, are the separately situated and operated Marine Terminals, and the Portland International Airport, plus real estate held for future riverfront property development.[1]

Private companies, large and small, operated on Swan Island either as major long-term businesses, or by sporadic appearance for purposes of occasional or specialty work. For many years leading into 1987 the two principal competitors on Swan Island, for major ship repair and related work, were Dillingham Ship Repair (DSR) and Northwest Marine Ironworks (NMI). As typically so in the industry both companies experienced cyclical operations, and in this sense could employ a work force fluctuating from several dozen hourly personnel to several hundred, or perhaps in excess of 1000.

2. Dillingham ship repair

DSR had been the more prominent of Swan Island operating companies, with an estimate of its hourly work force running to 1700 persons at the highest peak ever reached. However the last collective-bargaining negotiations looking toward renewal of a labor contract with MTC resulted in impasse by the fall of 1986, and with this DSR implemented objectionable changes to terms and conditions of employment for its unionized work force. A rancorous period of labor-management relations followed for approximately 8 months. MTC did not however engage in strike action against DSR, and its members as represented in this bar-

[1] The background facts set forth in *Longshoremen ILWU Locals 40 & 8 (STC Submarine)*, 299 NLRB 293 (1990), a Board decision rendered under Sec. 10(k) of the Act, illustrate one instance of the Port's functional scope and nature.

gaining unit continued to work under normal patterns of utilization.

The situation did not satisfactorily resolve itself, in consequence of which DSR gradually phased out and, except for final winding up, ceased operations on or about June 30, 1987. An entity called Dill Trust was created to liquidate the affairs of DSR and sell off its assets. For purposes of this case, it is known that Dill Trust operated for much of remaining 1987 in fulfillment of this winding up process.[2]

3. Traditional trade union representation

The Charging Party in this case comprises MTC (Metal Trades Council of Portland & Vicinity) and Pacific Coast Metal Trades Council, the superior entity located in Oakland, California with which MTC is affiliated. By the mid-1980s these two entities had developed a practice of negotiating jointly with employers headquartered at, or operating in conjunction with, the Port of Portland's ship repair facility at Swan Island. This practice yielded a joint contract with such employers, to which an applicable number of AFL–CIO affiliated local unions, plus the Teamsters, were parties. The major established employers at Swan Island with which such a joint contract existed were DSI and NMI. Other employers so organized were the relatively small L & S Marine that operated briefly on Swan Island, plus an unspecified few subcontractors.

Of the 16 International Unions whose Portland area locals were constituent in MTC, the joint contract at DSI pertained to 10 such affiliates while that at NMI pertained to only 9. The implication of this record would identify the International Unions from which these contracted party locals came as the Machinists, Boilermakers, Carpenters, Pipefitters (UA), Electricians, Sheet Metal Workers, Painters, Operating Engineers, Laborers, International Chemical Workers,[3] and again the Teamsters whose readmission to the AFL–CIO was not effective until late 1987.

4. Community considerations

Festering labor difficulties between DSR and MTC reached the attention of Oregon's governor, and he appointed Tom Brumm to be a labor liaison person with the Port of Portland effective about May 1, 1987. Brumm was charged with responsibility for generally working toward image-boosting labor tranquility at that facility. He had extensive background in the labor movement of the Pacific Northwest and from this, coupled with his political connections, sought to sophisticatedly mediate the DSR problem. Brumm also worked directly with key Port of Portland commissioners toward the matter of image, and to generally acquaint both new and existing enterprises about the favorable objectives he was expected to achieve.

Brumm remained in his position for approximately 18 months, during which time he monitored the arrival and growth of Cascade General as a private enterprise largely filling the gap left by DSR's departure. A former official of DSR had organized another separate enterprise named West State Inc. (WSI),and commenced its operations as a smaller, nonunion ship repair company at Swan Island in early 1987. WSI was another private employer that received Brumm's specific attention as it grew in significance at the Swan Island operations. It ultimately became unionized, and by 1988 reached a collective-bargaining agreement with MTC for its hourly paid work force.

5. Cascade general

Respondent originated as an operating division of a family owned, retail clothing store located in Goldendale, Washington, and doing business there under the name Ledbetters, Incorporated. In September 1985 Stephen (Steve) Anderson, a part owner of Ledbetters, began Cascade General as a ship, tug and barge repair business located in Vancouver, Washington, a city directly across the Columbia River from metropolitan Portland. Anderson established necessary shop, storage and trailer office facilities of about 16,000 square feet spread over 2 acres at the Columbia Industrial Park in Vancouver.

In connection with the startup Andersen employed William (Bill) Lundmark, a person with about 20 years' experience in ship repair and a former ship superintendent at DSR. After 2 years of general marine repair servicing Cascade General split from Ledbetters, and incorporated separately after first acquiring leases, tools and equipment of DSR. Roughly coinciding with these changes of late summer 1987, Cascade General relocated to the considerably larger premises at Swan Island formerly occupied by DSR for operations that continue to the present time.

B. *Case Outline*

By 1986 and extending into 1987 Cascade General was increasingly performing ship repair and related work over at Swan Island. This was accomplished by transporting employees, tools and equipment necessary to jobs in progress from the Vancouver facility to Swan Island for the actual performance of work there.

When DSR ceased operations Cascade General accelerated its presence at Swan Island and acquired new key executive personnel. As this unfolded Michael Fahey, MTC's executive secretary-treasurer at the time, became increasingly aware of Cascade General's presence and its possible significance to his members. Fahey had been a prime organizer of daily protest demonstrations against DSR during the 1986–1987 bargaining dispute, and held a position constituting the chief area coordinator for various unions within MTC. Consistent with his purposes Fahey obtained, or encouraged the obtaining of, authorization cards from any persons employed by Cascade General who he did not recognize as union members formerly working with and among the traditional and established Swan Island ship repair firms. Additionally, an MTC organizing committee was active on Swan Island during the late spring and summer months of 1987.

Fahey attended a casual, exploratory meeting early that summer at Cascade General's Vancouver headquarters, ac-

[2] A preexisting unfair labor practice complaint of NLRB Region 19 against DSR remained extant. In late 1987 a settlement of this proceeding was achieved, with monetary amounts to be distributed among 750 former shipyard employees of DSR. The settlement was referred to repeatedly in this record. A fuller description of this newsworthy resolution appeared at 133 LRR 251, as published by the Bureau of National Affairs in its weekly service for February 26, 1990.

[3] This labor organization was totally distinct from OCAW; only a principal word being shared in their respective names. See *BASF Wyandotte Corp.*, 278 NLRB 173 (1986).

companying leaders of the organizing committee and where Andersen and Lundmark were present to speak for Respondent. Before anything of consequence could be achieved through MTC's interest in the situation, OCAW obtained voluntary recognition from Respondent and these parties reached a labor contract about 2 months later.[4]

C. *Procedural History*

1. The instant case

After its filing in September this case resulted in early issuance of a complaint. However further proceedings on it were held in abeyance, along with certain contemporaneous representation petitions. This was done pending possible resolution of jurisdictional dispute contentions between MTC and OCAW within the AFL–CIO, by use of its traditional proceedings under article XX of the organization's constitution. Accordingly no action was undertaken on the complaint from early 1988, when first scheduled for hearing, until approximately 1 year later when article XX proceedings had not achieved a definitive resolution. During this hiatus further investigative attention was given the case within NLRB Region 19, resulting in presentation by motion to amend the ''supervisory'' issue when the case formally commenced.

2. Article XX proceedings

Based on such competing representational interests of MTC and OCAW, a proceeding was initiated by the Metal Trades Department of the AFL–CIO to resolve their claims. A presentation was made to Impartial Umpire Howard Lesnick, who ruled in favor of MTC through the issuance of a written ''Determination'' dated March 17, 1988. Lesnick's rationale was largely based on distinguishing ''successorship'' doctrine under settled Federal labor law from the AFL–CIO's internal policy of fundamentally seeking to preserve ''established relationships.'' The umpire's award was formally reviewed, and by letter dated October 28, 1988, AFL–CIO President Lane Kirkland advised Joseph M. Misbrener, OCAW president, as follows:

> In accordance with Section 14 of Article XX of the AFL–CIO Constitution, please be advised that the subcommittee of the AFL–CIO Executive Council, consisting of Secretary-Treasurer Donahue and Vice Presidents Sweeney and Hutchinson, has found the Oil, Chemical and Atomic Workers to be in non-compliance with the determination of the Impartial Umpire in the above-captioned cases.
>
> This finding of the subcommittee follows from the decision of the impartial umpire that OCAW's ongoing participation as the exclusive bargaining representative of the employees at the former Dillingham Ship Repair Co. facility, Swan Island, Oregon violates Article XX, and from OCAW's refusal to withdraw from that representation.
>
> Effective this date, therefore, OCAW will be subject to the following provisions of Section 15 of Article XX: [Sanctions deleted from quotation.]

Posthearing developments in connection with certain unsuccessful Motions to Reopen the Record revealed that by letter dated February 14, 1990 Misbrener had written to Cascade General as follows:

> This letter will confirm General Counsel John W. McKendree's telephone conversation with Wayne Landsverk, counsel for your company, of this afternoon concerning OCAW and Local 1-369's intent to not act as the exclusive collective bargaining representative of the employees of Cascade General, or of any other successor employer to the Dillingham Ship Repair Company, doing ship repair work at the former Dillingham Ship Repair Company facility, Swan Island, Oregon, or any other facility where the employer is doing ship repair work as Dillingham's successor. In addition, OCAW and its Local 1-369 forthwith shall cease and desist from acting in any way as the bargaining representative of those employees. Be advised that we are in the process of notifying your employees that OCAW is not now and does not seek to be, the employees' bargaining representative at the facility described above.
>
> You will recall that at our February 8, 1990, meeting, I informed you of my intention to disengage in accordance with the determinations of the AFL–CIO under Article XX of the AFL–CIO Constitution.
>
> Any inquiries you may have concerning this matter should be addressed to our General Counsel.

D. *Amendment to Complaint*

When counsel for the General Counsel moved to amend the complaint at the opening of hearing on February 7, 1989, he advised that other parties had been notified of such intention 4 days earlier. General Counsel enlarged on this in a specific regard by representing, as the motion recited, that Respondent's counsel had been informed of ''a pending investigation on this matter'' as early as January 20, 1989. The motion alleged that on or about July 31 Respondent had granted recognition to OCAW based on ''a third party authorization card check.'' Continuing, it alleged further, and in part, as follows:

> cardsigners of the authorization cards used for granting voluntary recognition were statutory supervisors and that the card check was an invalid determination of the employees union desires because of the statutory supervisors participation and involvement in the card check.

The attempted amendment was opposed by Respondent and Party to the Contract on collective grounds that it was beyond the limitations period of Section 10(b) of the Act, unrelated to original allegations of the complaint, and inexcusably tardy. After extended colloquy, during which both General Counsel and the Charging Party expressed willingness to accord a substantial continuance for opposing parties to deal with new issues, the proposed amendment was granted. In briefing the case now, these adversely affected parties argue that granting of the amendment was ''clear, serious error'' and an ''abuse of discretion.''

[4] All dates and named months hereafter are in 1987, unless otherwise indicated.

1. Intrinsic validity

In *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308 (1959), the Supreme Court discussed the Board's authority to discharge its duty of protecting public rights, holding that the agency's broad investigatory powers of inquiry are not confined to ''precise particularizations of a charge.'' Consistent with *Fant Milling*, the Board has long required a sufficient factual relationship between specific allegations in the charge and resultant complaint allegations. See *Red Food Store*, 252 NLRB 116 (1980), and cases cited therein.

Redd-I, Inc., 290 NLRB 1115 (1988), held that in deciding whether complaint amendments are closely related to charge allegations, the Board would apply a closely related test comprised of the following factors. First, the Board would examine whether otherwise untimely allegations involve the same ''class,'' or legal theory, as allegations in the timely filed charge. Second, the Board would look at whether otherwise untimely allegations arise from the same factual situation or sequence of events as advanced in the pending timely charge. Finally, the Board may consider whether a respondent would raise the same or similar defenses to both allegations. This third criterion was explained as meaning that a reasonable respondent would preserve similar evidence and prepare a similar case in defending against the otherwise untimely allegations as would have been prepared and preserved in resisting basic and timely allegations of the pending charge.

Both Respondent and Party to the Contract contend here that none of the applicable factors defined in *Redd-I, Inc.* have been satisfied with General Counsel's motion to amend. Further, both these adverse parties cite *G. W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988), to support their positions. This recent court of appeals decision denied enforcement to *G. W. Galloway Co.*, 281 NLRB 262 (1986), and in doing so involved two essential notions as law of the case. One was reiteration of the fundamental premise that Section 10(b) of the Act provides how an unfair labor practice charge defines and limits the scope of litigation brought by the Board. More specifically, Galloway also barred freewheeling expansion of 8(a)(1) grounded allegations in a complaint, stemming only from the catch-all, boilerplate ''other acts'' language of the Board's preprinted charge form.[5]

The amendment at issue here arises as an enlargement of theory under Section 8(a)(2), and although Section 8(a)(1) is invoked in the complaint, both originally and as amended, this is done derivatively and not as to impose a *Galloway*-type analysis on the situation. Thus the tests of *Redd-I, Inc.* are to be looked at directly, for they are plainly now controlling on the point. As to the class of violation or theory involved, the amended paragraph 6(d) alleges that the card check on which recognition of OCAW hinged was legally flawed by a bargaining unit populated only with statutory supervisors. In the larger context of ''representative complement'' theory, there must be some basic showing of a work force; that is persons being utilized and to be utilized in the business function involved. As contrarily argued, it is true that a representative complement case turns critically on business considerations, both current and those realistically projected. However this does not eliminate an equally compelling requirement that persons within the statutory definition of an ''employee,'' as set forth in Section 2(3) of the Act, are at work in the operation, and constitute the group against which other and future changes are to be judged. For this reason the claim that such a group was largely or exclusively composed of statutory supervisors is an allegation that closely relates to the representative complement theory as a matter of how to reasonably view the issue.

The second prong of *Redd-I, Inc.*'s test is more readily satisfied. Under that it need merely be observed that all dynamics of eventful mid-to-late summer of 1987 were a resourceful capitalizing on enterprise opportunity, and the managerial, financing, logistical and human deployment efforts at stepping into the void created by DSR's exit stand as one conglomerated factual situation in a single sequence of events.

Finally, I observe that regardless of whether the complaint originally suggested that Section 2(11) of the Act would become a major focus of the case's main issue, this is not necessarily to say that it must have been so couched. Board proceedings are typically, if not notoriously, devoid of discovery and advance disclosure that is routine in most other litigation; hence Respondent could have been equally chagrined had the basis of a representative complement assertion been the effectiveness of customer procurement efforts as compared to this actual claim of a tainted core to the bargaining unit. The point may be compared to cases of alleged discriminatory discharge allegations under the Act, in which instances a respondent employer is not informed of undisclosed rationale until a government case-in-chief has been presented. Only at that point does such respondent draw on its retained evidence, but without having known in advance whether disparate treatment, pretext, overt animus accompanying the termination, or some other rationale was to be faced. By analogy, therefore, an amendment that generates no more uncertainty than is present with the instances of unamended allegations is not defective pleading under the *Redd-I, Inc.* test.

The actual context of this case lessens the preservation of evidence factor that the Board repeatedly emphasized in *Redd-I, Inc.* This concern is best viewed as pertaining to specific episodal happenings, as when simple production records or informal supervisory notations would be germane to a defense. The preservation of evidence factor, is not, however, significant when the amendment in question does no more than create a predicate for retracing ongoing and highly visible business operations *in terms of how particular people contributed to the process*. Further, the Fair Labor Standards Act requires a minimum 2-year retention period for basic records of employees. 29 U.S.C.A. § 211(c); 29 CFR 516.6. Much of this data as to pay and hours worked would be necessary to analyze the representative complement issue, relative to the always present distinction needed to be drawn between supervisory and nonsupervisory personnel.

Most importantly here is the separate fact that when filing its answer to the complaint as originally framed, Respondent saw fit to respond to paragraph 6(a) as follows:

> Answering sub-paragraph 6(a), [Respondent] alleges that Cascade General recognized OCAW after OCAW demanded recognition and after a card count supervised by a retired NLRB attorney and arbitrator established

[5] In a later application of *Redd-I, Inc.*, the Board overruled past precedent tending to exempt 8(a)(1) complaint allegations from the traditionally ''closely related'' test, stating in part that it did so ''in light of'' the court's *Galloway* decision. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

that a majority of Cascade General employees wanted OCAW to be their collective bargaining representative.

This answer, served on other parties December 11, 1987, including dispatch to a now-disavowed address for OCAW, showed that the ''card count'' was understood early on by Respondent itself as an important component of its position that recognition of OCAW had been validly extended. By its very nature a card count reference relative to rank-and-file, or more technically termed statutory employees, demonstrated an awareness present well over a year before trial commenced that general circumstances of a card count by the outside arbitrator would be at issue. Thus, on the third prong of the *Redd-I, Inc.* ''closely related'' test, it became a matter reasonably to compose in preparation for defense. Accord: *Roslyn Gardens Tenants Corp.*, 294 NLRB 506 (1989).

2. Due process

As stated above, General Counsel's motion to amend was granted over objections. The hearing was adjourned at that point and did not resume until March 28, 1989. This was to permit Respondent and Party to the Contract an opportunity to prepare for the continued hearing in terms of expanded allegations being faced. The passage of this approximately 7-week period of time is reasonably sufficient for such preparation, given the close familiarity of the objecting parties to the job functions, work classifications and individuals holding positions allegedly supervisory in nature.

In *Vandalia Air Freight*, 297 NLRB 1012 (1990), it was expressly observed that when new matter is presented ''well prior to the hearing,'' there can be no successful claim that respondents have ''insufficient time to prepare a defense and present their case.'' The same assessment about sufficiency of the time to prepare would obtain when a substantial recess precedes taking up the newly amended matters. For this reason I consider that fundamental due process rights have been accorded in the situation, and reaffirm granting of this motion to amend.[6]

E. *Evidence*

1. Ship repair process

In general terms the ship repair industry is characterized by urgency of operations because of economic loss to the vessel's owner when it is unavailable to transport cargo. In this sense a vessel to be repaired is rapidly entered by crews of the various crafts necessary to the process. Illustrative operations by Cascade General have been repair of boilers, pumps, piping, propellers, rudders and shell plate, as well as structural renewal, inspections, electrical work and painting.

The magnitude of a ship repair job can vary both in terms of the vessel size itself and the particular repairs that are needed. Thus some jobs are brief, and require little in terms of hours worked by the necessary crafts. Other jobs, because of either vessel size or the scope of necessary work, may involve hundreds of employees working many weeks until completion. The first phase is safety clearance of tanks and holds by a marine chemist, following which deck setup, interior lighting, and necessary staging equipment functions occur. Ideally the various crafts coordinate timing and sequence of their particular contribution to the overall ship repair process underway.

2. Respondent's operational evolution

a. *Vancouver facility*

Respondent had begun with a small nucleus of people; Anderson and Lundmark in charge, using Rich Rohde and Stephen (Steve) Van Domelen as experienced ship repair and marine workers. By the end of 1986 Ed Bittner had been added as an occasional management type, and the craft nucleus enlarged by the hiring of Richard Lightfoot, Monte Canucci, Robert Lindsay, James (Jim) DeSerrano, and Lawrence (Lanny) Mathieu. This well experienced craft group expanded again in January, when Terry Gardner, Mark Bolton, and Dennis Eubanks appeared on the payroll for the first time.

The location at Vancouver was a relatively crude assembly of loosely adjoining industrial buildings, with even some unprotected openness and trailers that had been spotted nearby for office and administrative purposes. From the beginning Respondent possessed numerous tools and industrial equipment, including wheeled compressors, sandblasting gear and pickup trucks. It was not uncommon during the first years of operations from the Vancouver base for Respondent's employees to travel onto Swan Island, performing ship repair and related work on vessels that had been brought there.

Frequently this work was taking place in the midst of demonstrations and general disruption attendant on the DSR labor dispute, leaving Respondent's executives well acquainted with changing circumstances at Swan Island. An opportunity for dramatic action presented itself most tangibly when DSR abruptly ceased operations, and the possibility of essentially replacing it became apparent.

In early-to-mid July the assets of DSR were offered for sale by bid. Cascade General and WSI both sought the assets, competing with two auctioneers who also had submitted bids. In mid-to-late July the director of Dill Trust declared Cascade General's $1.6 million offer as the winning bid. After some dispute with the Port of Portland regarding ownership of permanent fixtures, Cascade General was allowed to use the former DSR assets on the premises of Swan Island. The next step in this process was to acquire its own separate foothold on Swan Island, and to this end Respondent undertook a course of dealings with the Port of Portland.

By July Lundmark had been elevated to corporate president of the enterprise, while Andersen as part-owner occupied the position of secretary-treasurer. The corporate entity at this time was still Ledbetters. Loy Kahler was employed by Respondent in mid-July as its executive vice president. He was a former long-service employee of DSR (and its predecessor), in a career culminating as production manager over the entire yard for 6 years, and latterly its estimator for the bidding of jobs. By July a management structure had materialized within Cascade General. Dale Krug was in charge of production, and Surendra Menon its manager for contracts

[6] The *Kellwood*, *Roure-Dupont*, *Douds*, and *Soule* cases cited in Party to the Contract's brief have been noted, however, whether considered singly or interrelatedly these authorities have inconsequential bearing on the point. Their full citations are *Kellwood Co. v. NLRB*, 411 F.2d 493 (8th Cir. 1969); *NLRB v. Roure-Dupont Mfg.*, 199 F.2d 631 (2d Cir. 1952); *Douds v. Longshoremen ILA*, 241 F.2d 278 (2d Cir. 1957); and *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), respectively.

administration and estimating. A stipulation of record between the parties establishes that Rohde, Bittner, and Jerry Way, a person possibly titled ship superintendent, were all statutory supervisors at times material to the case.

b. *Port of Portland accessing*

One of the early actions was done by Menon as an administrator for Respondent. He wrote to the Pacific Military Sealift Command of the United States Navy in Oakland, California, by letter dated July 31, as follows:

> Per our telecon of this A.M., Cascade General requests a copy of the Master Ship Repair Contract in an effort to be on the list of bidders.
>
> Cascade General is a full service ship repair yard that commenced operations in 1985 and is located at 2000 E. Columbia Way, Bldg. 52, Vancouver, WA 98661. Our mailing address is P.O. Box 129, Vancouver, WA 98660, and the telephone number is (206) 699-4934. We have recently purchased all the assets of Dillingham Ship Repair, including material inventory, machinery and equipment, lease-held improvements, rolling stock, office inventory, and hand tools. Our operations department will be located at the Dillingham facility at Swan Island.
>
> If you need further information, please contact me at your convenience.

This letter was answered on August 11 by Department of the Navy Contracting Officer Betty E. Crawford, who advised Cascade General as follows:

> Re: Application for Master Agreement for Repair and Alteration of Vessels
>
> Encl: (1) Insurance Requirements
> (2) Facility Survey Report (3 copies)
> (3) Master Ship Repair Agreement (5 copies)
>
> 1. Your letter of 31 July 1987 requested that you be sent the necessary forms to apply for a Master Agreement for the Repair and Alteration of Vessels. Please complete the enclosed forms and provide the following information for our review.
>
> a. Description of plant facilities, (two copies, please).
>
> b. List of officials and the qualification of each for ship repairs, (two copies).
>
> c. A general statement as to the quantity and scope of ship repair work that you have accomplished, (two copies).
>
> d. Financial statement consisting of a current balance sheet or statement on MA Form 151 (minimum financial information), certified by a certified public accountant or by a responsible official of your firm, (two copies).
>
> e. Insurance coverage in accordance with enclosure (1), (two copies).
>
> f. Ship Repair Facility Survey Report per enclosure (2), Items A through I, (two copies). After receipt of this report you will be contacted to arrange an on-site inspection of your facilities and interview with your officers and supervisory staff by a representative of this Command.
>
> g. Five copies of the Master Ship Repair Agreement, enclosure (3), executed by your appropriate official on Page 1, except for date, and the last page where appropriate. Please read this document carefully, because all work you perform for us will be subject to its provisions.

Meanwhile Respondent's officials had been in contact with the Port of Portland relative to leasing what DSR had vacated. On August 14 Portland Ship Repair Yard Manager Guy J. Alvis wrote to Anderson as follows:

> We are pleased to inform you that the Portland Ship Repair yard can make selected properties previously leased by Dillingham Ship Repair available to your firm on a month-to-month basis. The square footages available are based on our recent walk-through. The rates quoted are based on the package outlined below and are from the schedule dated July 28, 1987.

Rental	*Sq. Ft.*	*Rate*	*Monthly Rent*
Bldg. 9 (64)	13,670	$0.3583	$4,898.50
Bldg. 4, Bays 8-10	96,041	0.2355	22,618.78
Bldg. 50, Bay 3	3,000	0.30	900.00
Bldg. 63	12,667	0.3181	4,030.00
Bldg. 63A	8,290	0.1461	1,210.94
Open Yard Space	115,400	0.06	6,924.00
Security & Nursing Fee			10,000.00
Totals	249,068		$50,582.22

> Naturally, this offer is subject to the execution of a lease mutually acceptable to both parties. I would appreciate hearing from you at your earliest convenience. Please feel free to call if you have any questions.

Negotiations ensued between the parties based on this letter and the cost quotes it contained, with the result that a temporary agreement was reached permitting Respondent to begin a move of its chief business operations to Swan Island itself.

The form and timing of such temporary agreement was embodied in two leases of ''Improved Spaces,'' both effective from September 1 through November 30, as formally and legally agreed to by Respondent's chief official and the Port's executive director. The first agreement listed and fully identified various buildings comprising office, warehouse, and shop space, plus those with small crane-served shops, large crane bays, fenced yard space, shed, and a vehicle shop. Here the approximate total leased space of these buildings was 135,000 square feet, predominantly as building 4 in which bays 8, 9, and 10 were located with a total area of 96,000 square feet itself. The second temporary lease covered nine specific yard space areas, ranging in size from 6000 to 31,375 square feet and roundly totaling 115,000 square feet in the aggregate.

Both leases permitted either party to terminate the contractual arrangement up to 30 days' notice, or it could otherwise terminate by the lessee's default. These leases were ulti-

mately extended on their original ''month-to-month'' character until spring of 1988, when nontemporary leasing of the premises was fully settled on.

c. *Transitional phase*

With the temporary leases as a foothold, and DSR no longer present to compete, Respondent increased its activities at Swan Island. Progressively more and more tools and equipment were transported for placement among the former DSR assets in preliminary facilities used by Respondent on Swan Island. Furthermore, key personnel who had more typically worked at the Vancouver facility relocated to Swan Island, and began working there as a normal work station. The transitional phase also included more sophisticated management controls as provided by Ernest Brawley, DSR's former vice president of finance and administration. During the summer months of 1987 Brawley was simultaneously a functionary of the Dill Trust liquidating entity and, with a partner, engaging in the business of providing computerized payroll services to Respondent and other clients with hardware that Brawley's subchapter S corporation had acquired from DSR. Finally, Respondent's principals Andersen and Lundmark had undertaken major financing negotiations with area banks, and were anticipating business loans necessary to the potentially expanding enterprise.

d. *September (1987) and beyond*

On September 1 Cascade General was formed as an Oregon corporation, and its preceding form of business was dissolved. The actual date of September 1 was also significant in that new payroll and record keeping systems started up then. Some employees received pay increases from that point onward, including those who were officially retitled and given explicit responsibility and authority.

After September 1 Kahler's presence and authority was progressively more prominent, and in May 1988 he was promoted to be Respondent's president. By this time formal titles of vice president were held by Krug, Menon, and Brawley, the latter having been officially employed to head finance effective in the preceding October.

One or more persons had been formally designated to head each craft as general foreman or foreman, and hourly pay raises were made effective for those so promoted effective September 1. The fall of 1987 brought a pronounced increase in Respondent's hourly employment level, and after a late year return to less than 100 persons the time after that from 1988 onward has been generally reflective of the industry's cyclical nature.

3. Management testimony

Kahler testified that he was closely involved in early discussion with Port of Portland representatives relative to Respondent's desired lease. He originally faced a ''phenomenal'' increase in cost as compared to what DSR was charged, and this factor, coupled with separately proposed requirements that would impose a significant flat expense to the lessee for security and nurse service, are what kept the lease in a temporary mode for nearly a year. Ultimately, though, Respondent did acquire approximately 90 percent of the facilities formerly used by DSR. Kahler estimated that the related purchase of assets gave Respondent a business capacity potentially warranting the hire of 600–800 hourly employees.[7] Kahler superimposed further testimony on all this by asserting that reliable work force projections were ''impossible,'' because of uncertainty in the bidding, awarding, and workload scheduling process.

Kahler also testified about financing for the purchase of DSR assets. As successful bidder Respondent had made a nonrefundable earnest money deposit of $50,000, with 45 days to complete the balance due on $1.6 million. For most of this period a bank loan had looked probable, however several days before an August 31 deadline the bank committed only $250,000. Kahler testified that urgent, last-minute dealings with a financial broker provided the balance due to confirm this purchase.

Anderson testified that he could not have predicted as of July what Respondent's number of employees might be at a future time. He recalled also participating in the lease negotiations, and denied that the Port of Portland had at any time expressed concern about Cascade General being ''a nonunion company working on Swan Island.''

4. Question concerning representation

a. *Other than OCAW*

Fahey testified that he had been generally aware of the presence of an enterprise named Cascade General during the waning days of DSR operations. He was principally occupied during this time, namely the approximately first 6 months of 1987, with the DSR situation, coupled with an organizing drive at newly formed WSI. As Fahey spent his considerable time at Swan Island dealing with the matters requiring his attention, he was aware that various individuals who he knew well as MTC members, and former coworkers of his own, were employed by Respondent. A person more noticeable than most was Terry Gardner, who Fahey was well acquainted with as an experienced machinist and former employee of major ship repair firms traditionally operating at Swan Island. Fahey viewed the newcomer Cascade General as another potential organizing target, however it was not a priority matter with him both because of other distractions and because he considered that its employees seemed already to be established union members.

The meeting that Fahey did attend at Respondent's Vancouver office had been arranged by Greg Deblock and Stanley Deuel, both union officials. Its purpose was to acquaint persons running Respondent with MTC's traditional role at the shipyard. This meeting occurred in approximately late June, and was an amicable discussion of respective labor and business objectives. It resulted in Andersen requesting that the unions provide him a letter, to be useful in presenting to ship owners from whom he hoped to acquire work. Fahey undertook followup to this request, and by letter dated July 9, which he hand-delivered because of its delay in preparation, wrote Andersen as follows:

[7] The Military Sealift Command Ship Repair Facility Survey that had been supplied as an enclosure to Crawford's letter was, to all that is known, first completed by Kahler on December 30. After details on the berthing, dry dock, handling and shop facilities possessed by Respondent, that document concluded with a current (and ''normal'') showing of 200 skilled with 100 unskilled employees, and a ''potential maximum'' of 800 and 200, respectively.

> The Metal Trades Council of Portland and Vicinity Organizing Committee has met with the Principals of Cascade General to explore areas of mutual concern.
>
> 1. Give the customers the best service and quality of workmanship possible.
>
> 2. Work out methods jointly to keep the cost of repairs and overhauls competitive.
>
> 3. Supply Cascade General with the best qualified workman available to meet their Company's goals an objectives.
>
> 4. Stress the importance of a safe, working environment.
>
> We will continue to meet with Cascade General to pursue a mutual acceptable labor agreement between both parties.
>
> Mr. Lundmark and Mr. Anderson have stated to us they do not have any problems working with the Metal Trades Council in the future to achieve their goal to meet and satisfy their customers needs.
>
> Please feel free to call me at your convenience if you have any additional questions. I can be reached at (503) 283-6039.

Fahey then attempted to maintain communications with Anderson. He did so until a point in late July, when Anderson suddenly and surprisingly informed him in a telephone conversation that he could no longer continue normal discussions on advice of counsel. Anderson did explain this was because OCAW had been recognized as collective-bargaining representative for hourly employees. Shortly after this Robert Plympton, business manager/secretary-treasurer of Boilermakers Local 72 in Portland, elected to file a representation petition as a tactical step countering the reported OCAW recognition. As soon as he could conveniently do so, Fahey followed this with a representation petition through the NLRB's Portland Subregion for the same hourly bargaining unit of all ship repair crafts. These petitions were filed August 28 and September 1, respectively. Fahey followed his action with a letter dated September 9, written jointly to Respondent's three highest officials. It stated:

> The Pacific Coast Metal Trades District Council and the Metal Trades Council of Portland & Vicinity demand recognition of Cascade General, the successor to Dillingham Ship Repair as the bargaining unit for all production, repair and maintenance employees within the bargaining unit in the employ of the Employer signatory hereto, and shall apply to all work and activities of the Employer in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, Columbia and Willamette River and their tributaries, including but not limited to, dredges, floating drydocks, offshore drilling vessels, barges, mobile drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith.
>
> The Pacific Coast District Council Executive Board and the Portland Metal Trades Council representative will be glad to meet with you at your earliest possible date to discuss the above matter.
>
> Mr. Clarence Briggs, Secretary of the Pacific Coast Metal Trades District Council can be reached at area code: 415-636-0500, mailing address is: 8150 Baldwin Street, Oakland, Calif 94621, Mr. Michael T. Fahey Sr. Executive Secretary of Metal Trades Council of Portland and Vicinity, 503-283-6039, P.O. Box 17358, Portland, Oregon 97217.

These petitions, one of the Boilermakers and one of MTC, are the cases blocked, and remaining blocked, by litigation in this proceeding.

b. *OCAW*

James Watts testified that he has been president of the labor organization which is here Party to the Contract since 1978. The organization has been known since 1957, and for many years following that date was an affiliate of the International Chemical Workers Union. That affiliation ended in 1974 and for several years the organization remained independent. In 1978 it affiliated with the Oil, Chemical and Atomic Workers International Union, a constituent of the AFL–CIO. Watts has been an official with the organization since 1962, beginning as vice president and progressing from that to secretary-treasurer until his elevation as president in 1978.

He testified that in the period prior to June (1987), Party to the Contract was an amalgamated local union of approximately 1600 members. These were spread from Alaska's North Slope through the general Pacific Northwest area, but in numerical terms principally those members at the Hanford, Washington nuclear facility. A particular component of its employee representation included waterways operations on barges and tugs, particularly as to subsidiaries of the large West Coast Crowley Maritime enterprise.

Watts conducted a meeting with Respondent's employees at the Vancouver worksite on July 27. Watts testified that after he asked any supervisory persons present to excuse themselves, authorization cards for OCAW were signed by all the 10 individuals remaining present. Based on this acquisition Watts wrote to Respondent by letter dated July 29, specifying the attention of Anderson ''and/or'' Lundmark, as follows:

> Please be advised that a substantial majority of your workers, excluding clerical, have indicated that they would like to be represented by the Oil, Chemical and Atomic Workers International Union and its Local 1-369. At this time we would respectfully request that you recognize us as the legal bargaining representative for your employees. We have arranged for Richard Stratton, an arbitrator referred by the Federal Mediation and Conciliation Service, to conduct a card check to assure you that an overwhelming majority of your employees desire representation by OCAW Local 1-369. Mr. Stratton and Local Representative Jerry Cramer are prepared to make themselves available at your offices, Friday, July 31, 1987, to make the check. If you are agreeable to making such a check please notify me immediately. I see no sense in going through a costly National Labor Relation election procedure when we have such obvious support amongst your employees.

5. Card check

The proposed card check took place on July 31, with OCAW compensating Richard V. Stratton, retired NLRB

staff member and privately practicing arbitrator of the vicinity, to carry out this impartial function. It was done at the Vancouver premises, with Anderson providing Stratton a list of employees and William A. (Jerry) Cramer having previously provided him all of the signed cards. The employer's list was typed and contained eleven names as ''regular employees'' of Cascade General. Stratton retired briefly to consider this material, and returned to advise the parties that a majority of employees, in his view, had designated OCAW as their collective-bargaining representative. On this basis Stratton signed a document prepared on his letterhead reading as follows:

> Pursuant to a card check by the undersigned, it is hereby certified that a majority of the employees of Cascade General have selected Oil Chemical and Atomic Workers, Local 1-369 a labor organization, as its exclusive collective-bargaining representative in the following unit: All employees excluding office clerical employees, guards, professional employees and supervisors, as defined in the National Labor Relations Act.

On this basis Anderson also signed an addition to the document typed below Stratton's signature which read:

> With the certification of the card check by Richard V. Stratton on July 31, 1987, Cascade General agrees to recognize the Oil, Chemical and Atomic Workers Local 1-369 as the exclusive bargaining agent for all employees of Cascade General—or any joint ventures that Cascade General has or acquires in the future.

6. Profiles of employment at Respondent

a. *Fluctuation and payroll totals*

The case record does not pinpoint levels or extent of utilizing craft employees during Respondent's startup year 1985 at all. From mid-1986 through calendar year 1987 this information appears as summary listings backed by handwritten weekly payroll sheets. Beginning for September (1987), and allowing slight transitional overlap, the employment data thereafter appears as computer-generated payroll pages with detailed breakouts as to hours worked, gross earnings, and total deductions from the individual's net pay. As to the year 1986, one in which several individuals under scrutiny as claimed supervisors were first employed, a span of near-constant fluctuation in weekly employment levels is shown. Midyear showed the highest weekly totals, twice in the 50's and after two pronounced slumps in early September and again in late October the year was finished with an uncharacteristic stability during November and December averaging about thirty employees (Christmas week excluded from the calculation) in the narrow range of 22–34.

Following this half-year background, the first 8 months in 1987, with particular attention to mid-summer, are most significant to the several issues of the case.[8] Late 1986 momentum continued once the second holiday week was past, and for 1st qtr. 1987 a weekly average of 46.5 was shown in the range of 21–74 employees. In 2d qtr. 1987 the average for a full 13-week period increased to about 51 employees. Here quite a markedly wider range existed; 4 workweeks having only 25 or less employees, while back-to-back totals of 118 and 87 appeared in mid-May and the single upsurged week of April 17 with 82 on the payroll.

From all this the case focuses on July, as the eventful month of OCAW organizing and the card check-based granting of exclusive bargaining recognition by Anderson. July began with the same modest total of about 25 which had ended the second quarter, followed by workweeks ending July 10 and July 17 when for both of them only 18 persons were employed. The pay period ending July 24 was the lowest as among the 2-1/2 years in evidence, with only 11 employees even including Bittner and Rohde. This increased in week ending July 31 to 16, however the total number of hours worked by the 11 employees of July 24 exceeded the 16 of July 31 as 373 and 352, respectively, or averages per person of 34 and 22 hours shown as worked. Of course, each of the 10 card signers for OCAW were on the July 31 payroll, allowing for an informal entry that Bolton took vacation. Neither Bolton nor DeSerrano were among the minimal 11 persons employed during the preceding workweek of July 24, however the handwritten payroll sheet for that week shows the starting of Bolton's name but then being crossed out.

August showed a relatively stable employment level, with the four weekly pay periods of that month being 22, 30, 25, and 24 in sequence. The significant fact that Cascade General reincorporated effective September 1, and Brawley's business service enterprise commenced computerized payroll service to Respondent, clouded an accurate reconstruction of employment until matters settled down by mid-September. What shows from the records in evidence is that 193 persons were employed for a weekly pay period established as ending September 6, and the following week was otherwise still the highest total ever shown for Respondent at 134. The final 2 weeks of September dropped to 113 and 63, respectively, however 4th qtr. 1987 started with high numbers and, as shown below, remained there even through the yearend holiday period. By late October 285 persons were employed, and during the final 2 months of the year Respondent employed from 326 to 471 persons in 5 of the included workweeks.

b. *Occupations utilized*

As a prelude to application of law in a ''representative complement'' case, the type of jobs in use must be known with certainty. Here the summary can be shaded in meaning when trade union organizations are the reference. At another extreme a certain amount of ''cross-crafting'' was engaged in as Respondent deployed its personnel, in addition to which particular individuals were experienced in more than one occupational field.

Given these factors a fundamental listing of occupations is still apparent, as being those utilized by Respondent in its basic ship repair business. This is so whether viewed while exclusively at Vancouver, during its transitional and stretched out relocation to Swan Island, or after it had matured into the ''major player'' among the Port of Portland Ship Repair Yard's permanently based companies as it had given promise of being by early to mid-1987. The occupations are those which were necessary to the overall cycle of marshalling tools and equipment, preparation, undertaking and reliable

[8] The tabulations immediately following are not exact, nor do they account for the minor effect of persons like Bittner and Rohde, who were stipulated to be statutory supervisors.

completion of needed vessel repairs. In these fundamental terms, and referring to late 1987 by which time job classifications were computer-generated (numbers shown parenthetically) the occupations were:

Job Group

1. Inside (shop) Machinist[9] (07)
2. Boilermakers (01)
3. Carpenters (Shipwrights) (02)
4. Electricians (04)
5. Laborers (05)
6. Machinists (07)
7. Painters (08)
8. Pipefitters (09)
9. Riggers (15)
10. Warehouse (16)
11. Sheetmetal (20)
12. All other (indirect) (22)

These rather precisely recorded classifications differed little from what the industry considered normal and necessary. Using DSR's busy, if not peak, periods as point of reference, Kahler testified that the classification listing would be Boilermaker, Shipwright, Pipefitter, Operating Engineer, Electrician, Sheet Metal (Worker), Painter, Laborer and Rigger, plus the Teamsters occupations. Comparably, Anderson testified that his hourly employees in July were the painter, welder, machinist, mechanic, electrician, and rigger crafts, plus a truckdriver.

7. Projects performed

The facts of employment utilization by Respondent reflected actual vessel repair projects obtained during its ongoing operations. As to key year 1987, and early into 1988, these are summarized in General Counsel Exhibit 15-B, in which two specific jobs of a bid amount exceeding $50,000 were shown for the February-March and May-June (1987) timespan as the vessels ''Trinidad Glacier Bay'' and ''Trinidad Aspen.'' In addition to these projects, with estimated man-hours running into the thousands, Respondent was otherwise commonly involved in small maritime and waterways repair work in and around the metropolitan area. Additionally it had maintenance work at its own Vancouver premises, or when later set up over the extended time of actually completing a full-fledged relocation of operations to Swan Island.

Other ships also show as being worked on during the last half of 1987 and into early 1988. According to the tabulation there was vessel repair work of some kind during each month of late 1987, the two earliest of these being based on bids submitted August 25 and September 4. Of these the earlier bid was in the rounded amount of $1.2 million, easily Respondent's largest job of the year (Arco Prudhoe Bay), having estimated manhours for October alone in excess of 30,000.

[9] This occupation was identified as being at a shop location producing tools and steel product for use by those employees actually boarding or working adjacent to the vessel under repair.

8. Supervisory issues

a. *General facts*

The essential nature of this industry meant that a diffused sort of authority was present during the performance of available work. This arose from both geographical dispersal of employees, and, on vessels sometimes running 600–800 feet in length, the scattering of employees onto, into, and near to the ship being tended. Additionally, small work groups would often form, if not spontaneously then by accepted practice among these mostly experienced ship repair personnel.

One emblematic factor was extensively covered in testimony by numerous witnesses. This was the point of whether at ship repair companies operating previously and traditionally on Swan Island, plus as to Respondent's personnel both before and after the summer 1987 relocation, the wearing of an all-white hard hat by a person meant this was a designated craft supervisor. While some variations to this practice occurred, the predominant and persuasive evidence is that the functioning presence of a ''white hat'' indicated that person was at least viewed, and to a further extent serving, as one authoritatively directing the work of others in the craft.

b. *Evidentiary outline on individuals in question*

(1) Richard Lightfoot

Lightfoot was not called as a witness during the trial. This individual was first hired by Respondent in December 1986 as the specialist for industrial painting. He remained in fairly constant employment throughout 1987, and coextensive with formalization after Cascade General's reincorporation was designated general foreman for painting by Lundmark effective in September. Lightfoot had considerable background in this occupation of the ship repair industry, by reason of previous employment at both DSR and NMI.

Robin Ramage has been employed by Respondent since April (1987). He is a boilermaker by trade and at the time of hearing a foreman, as then recently promoted from leadman. Ramage and Lightfoot both formerly worked at DSR, where Lightfoot was the paint general foreman. Ramage testified that Lightfoot had arranged for him to be employed with Respondent by clearing it with Lundmark. At the time Lightfoot described himself as, and Ramage observed him in the performance of, being Respondent's painter foreman. Ramage elaborated with testimony that Lightfoot directed subordinate foreman or leadmen in the assignments of journeymen painters to particular vessel hull or tank work.

For the period April through August, Lightfoot had the highest hourly pay rate of any person among Respondent's listed main core of 11 employees. In this group he was at $14 per hour, with most others at $13 per hour, and only Terry Gardner at the intermediate $13.50 rate. By September, Lightfoot was coded as a level 1 foreman at $14.50 per hour.

(2) Stephen Van Domelen

In this individual's first employment with Respondent in late 1985, he viewed himself as a foreman. He is a boilermaker by trade, and was demoted in late 1986 to continue with Respondent as a craft journeyman. Van Domelen testi-

fied that subsequently in late spring 1987 he was promoted back to a foreman position. During the formalized changes of September 1987 he was designated sheet metal senior foreman, with express authority to at least hire employees needed for his function. Van Domelen has approximately 20 years' experience in the industry, having previously worked for both DSR and NMI.

Van Domelen testified that during the period from approximately May (1987) through July he fulfilled his status as a foreman by directing other employees in repairing structural members of ships. This was a welding function to bead and weld metal cracks, and Van Domelen exercised the authority to establish actual work procedures and meet scheduling deadlines.

Ramage also testified regarding his observations of Van Domelen, recalling that this apparent foreman supplied job material, adjusted tasks as special work problems might require, and obtained persons to serve as the mandatory ''fire watch'' of work in progress.

During the April through August period, Van Domelen was one of the persons paid at a $13 hourly rate. With the September changes he was coded as a level 2 foreman at $14 per hour.

(3) Monte Canucci

This individual's original employment by Respondent in August 1986 was as a boilermaker. Effective around October (1987) he was named by Lundmark to be general boilermaker foreman with express authority to hire and fire employees in running Respondent's plate shop. He has worked on Swan Island since the early 1970s, both for general industrial companies and, as periodically with DSR, in ship repair work. His experience background is that of steel fabricator and boilermaker. Van Domelen testified that on his own demotion in late 1986, Canucci was the person who took his place.

Canucci testified that during the period prior to July 31, he was not officially a foreman, but insofar as work matters were concerned would only speak to other employees about what was not right or being done unsafely. He added that the employees so spoken to would ordinarily correct the work in progress according to his observation and instructions. Canucci relayed timecards of others to Respondent's office, and occasionally distributed paychecks. He denied habitually wearing a white hat in performance of his work, recalling instead that when he did wear a hard hat it was green in color. During this timespan Canucci was paid at the $13 hourly rate.

Ramage testified that his first 3 days working for Respondent were to run a boilermaker crew on the second shift by a ''turnover'' from Canucci. The turnover was a procedure of Canucci and Ramage conversing sufficiently long at the shift change to set up a productive and efficient basis for the arriving crew to continue the work in progress. Ramage testified that after the third day he found that Canucci was countermanding his assignments, and for this reason he requested and obtained a drop back to journeyman status. Ramage's observation from that point onward included seeing Canucci handle paycheck problems and issue work instructions. Ramage also testified that for informal short-term layoffs, Canucci would effectuate this by telling the involved employee to stay home pending a telephone call back from himself or Bittner. Ramage contradicted Canucci by recalling that he usually did wear a white hard hat in the performance of his job.

(4) Robert Lindsay

Lindsay did not testify. Respondent's payroll records show him employed by late 1986, and continuing with much regularity through 1987. During the month of July 1987 he was on the payroll for week endings July 3, 7, 10, and 17, and while not showing on week ending July 24 is noted as being on vacation during week ending July 31. Lindsay continued showing on the payroll during early August workweeks. He appeared on the computerized payrolls in September with a coding showing his skill craft to be boilermaker.

(5) Terry Gardner

Gardner also did not testify. Respondent's payroll records show him employed by January 1987, and he continued in substantial and regular employment with Respondent for the balance of that year. He is on Respondent's payroll with full hours of employment for each workweek in the significant months of July and August. On the computerized payroll for early September, Gardner is shown as a coded level 1 foreman for the machinist craft.

Bruce Morace testified that he was hired as a machinist by Gardner in the spring of 1987. Thereafter he was assigned work by Gardner, and others, such as exact tasks on the discharge valve or pump of an engine room. Additionally, Morace testified that Gardner had asked him to perform overtime work on occasion.

Robert Enzenbach and Melvin Johnson were other machinists who testified to being hired by Gardner in early 1987. According to the journeymen employees, Gardner later corrected a paycheck problem for each of them.

(6) Mark Bolton

While it is not verified in payroll records for the particular month, Bolton testified that he was actually hired in December 1986 by Rohde, and performed mechanical work within his craft of machinist for a total of 12 hours spread over 2 days at Respondent's Vancouver facility. After another short 4-day stint of employment in January, he was hired for a third time by DeSerrano. This occurred in February, and Bolton testified that after a short time he was elevated by Gardner from a leadman to running jobs as a foreman. For this he was paid 50 cents an hour more, and had greater responsibility for job accomplishment by other employees, while regularly wearing an identifying white hat. Bolton had approximately 9-1/2 years previous experience in ship repair at the Port of Portland facilities, working for DSR and NMI in the machinist classification.

Bolton testified that by early 1987 the machinist craft function at Respondent had become in charge of Gardner, with DeSerrano as his first assistant. Bolton himself was the third in line of authority after his promotion and pay increase while the Glacier Bay job was underway. He recalled that the total complement of machinists went as high as 20 for the repair work to this vessel.

Bolton also testified that he quit any employment status at NMI when it appeared the work with Respondent was reasonably steady. While he did experience brief layoffs as the

year 1987 passed, he remained in fairly continuous employment there. Notwithstanding these interruptions, Bolton testified specifically that the supervisory configuration of Gardner, DeSerrano and himself, as ''number three'' foreman in charge of machinists on night shift, continued in effect at least through the month of July.

Morace testified that no several occasions Bolton gave him short-term layoff notices as a ''pink slip,'' and that on one particular confrontation with Bolton as to work processes he complied with instructions given.

Respondent's records show that Bolton's pay rate was $12.75 per hour until early May, and then increased to $13 equaling that being paid to Van Domelen, Canucci, and others. After the changes in September, Bolton was coded as a level 2 foreman at $14 per hour.

(7) James DeSerrano

DeSerrano testified that he was hired by Bittner on November 5, 1986 as a machinist. After Respondent moved its chief operating headquarters to Swan Island DeSerrano began to run jobs, and had the authority to select persons actually to perform authorized overtime. DeSerrano testified that while never expressly told he was a foreman, he ''possibly'' chewed out employees in the process of guiding their work. DeSerrano denied that during the period January to July any of the experienced machinists working for Respondent were titled as either superintendent or foreman. He did add that when crew size warranted it, Gardner, Bolton and himself directed the work of machinists. DeSerrano has nearly 10 years experience working in the Port of Portland shipyard, mostly with NMI as a journeyman and leadman, plus lesser time with DSR.

Morace testified that on his first day of reporting for work it was DeSerrano who had him fill out hiring papers, and then gave him a specific job on a ship to be boarded. There were 10 to 20 other machinists already lined up for work that day, and DeSerrano dispersed them throughout the ship to work on specific pieces of machinery, pairing up employees of the group as necessary. Morace also recalled DeSerrano wearing the distinctive white hard hat then, and whenever he subsequently saw him at the worksite.

William (Jim) Blake testified that early in January, DeSerrano had recruited him for possible work with Respondent. He was quite familiar with DeSerrano as a leadman of the wheel gang when both were NMI employees. When Blake was later laid off from his machinist position at NMI, he sought out DeSerrano and found him running a machinist crew on the Trinidad Aspen job (correcting himself for having first named the vessel Glacier Bay). DeSerrano confirmed work was available for Blake, and he was immediately hired for duties on a rudder job which entailed pulling components, reworking staves and reassembly. Blake also testified that DeSerrano had told how Lundmark first placed him in control of the machinists department until being supplanted by Gardner, and that he regularly saw both Gardner and DeSerrano park their cars inside the shipyard security gate where a pass was required.

DeSerrano was receiving the $13 hourly pay rate from April through August. After payroll changeover in September, DeSerrano appears as a coded level 2 foreman at $14.

(8) Lawrence Mathieu

Mathieu testified that he was hired by Respondent on December 6, 1986, for miscellaneous duties of an electrical, plumbing, and parts chasing nature. His most recent change of employment was in September 1987, when appointed supervisor of maintenance electricians and support services.

For the ship repair function that Respondent later became more fully involved with as 1987 progressed, Mathieu performed the actual work of dropping illumination into tanks of vessels, hooking up transformers, and regulating the electrical controller of air compressors. On the occasions prior to July when Mathieu performed electrical work along with others, he testified that Rohde seemingly put him in charge to be sure that work was completed within general instructional guidelines. He described the colleagues in such a situation as mostly people who ''knew what had to be done,'' but he was free to correct their work as he saw fit. However, he expressly denied ever wearing a white hat during that portion of his employment with Respondent which preceded September. Mathieu has a general background with a variety of industrial supply companies of the area.

Ramage testified that he had often seen Mathieu working along with a crew of electricians, and being the one telling others what needed to be done. Ramage also recalled that it was true Mathieu was not the wearer of a white hat during the pre-September period, and in fact followed the unusual practice of not wearing any hat at all.

At the time of being hired by Respondent, Mathieu had been working as a carpenter out of the hiring hall maintained by Local 611. Gerald Krahn, a business representative for the Oregon State District Council of Carpenters, testified that in February he had contacted Mathieu for a job dispatch. Mathieu declined the opening, and in the conversation that followed stated he was dropping out of carpenter work because of having been hired as a foreman by Respondent for shipyard-type work.

Mathieu's hourly pay rate during the April through August period was $13. After the changeover in September he was coded as a level 1 foreman, but for reasons not known was set at an initial pay rate of only $14.

(9) Dennis Eubanks

Eubanks testified that he first started with Respondent in December 1986, and although telling Lundmark at the time that he was an experienced rigger he was actually employed as a machinist to then work with his friend DeSerrano. Eubanks continued with Respondent, and effective September 1987 was appointed supervisor in charge of the rigging department. This entailed the authority to discipline employees, and the assumed authority to hire and fire when necessary as a designated general foreman.

Eubanks described the rigger craft as one involving movement of heavy equipment by use of cranes, fasteners and lifting gear. The riggers do necessary hook up and sling arrangement, while the cranes are operated by another craft that riggers coordinate with by use of hand signals.

As 1987 progressed Eubanks gravitated more into a combination job as machinist and rigger. He named Lundmark, Rohde, and Bittner as the persons in charge of all riggers, adding only that he would make minor assignments to others

and fill out work hours on timecards for some of the other riggers.

Ramage testified that during the general time of spring 1987, Eubanks was in charge of all riggers, and had at least two foremen, one named Parsons, under him in the hierarchy. Ramage added that he had actually observed Eubanks instructing those subordinate foremen in what needed to be done.

For the April through August period Eubanks was paid the hourly rate of $13. After September he was coded as the level 1 foreman, with a corresponding $14.50 hourly rate.

(10) Robert Routley Routley testified that he was hired by Respondent about July 1 as a truckdriver to do ''a little bit of everything,'' including certain warehousing tasks and custodial duties as necessary. In September 1987 Kahler appointed him general foreman over the warehouse and related operations with express authority to hire and fire as necessary. Routley had last been a truck driver at DSR, and was holding that job when it ceased operations. He had maintained Teamster Union membership up to the end, but took a withdrawal card from this labor organization when the final layoff came.

Routley has experience as a warehouseman going back to 1965 with DSR and its predecessor. He described his work after first being employed by Respondent as driving a truck, running the overhead crane, hauling material to jobs, and even sweeping the floors if necessary. One of his first specific assignments, as made by Lundmark, was to canvass the local automobile dealer for a good running company truck. In the process of doing so Routley test drove a flat bed truck which Lundmark then purchased. Later in his employment Routley was instrumental in the transport of tools, materials and equipment to Swan Island operations from the Vancouver base. In doing so he pulled a 20-foot trailer stocked with drop cords, welding lead, torches, ladders, and the like. This trailer could then be spotted near the Swan Island job in progress for as long as its contents were needed by the various craft employess.

Routley was the person typically dispatched by Bittner to pick up miscellaneous supplies such as light bulbs, welding rod, steel plate and hardware. In this process he either furnished a purchase order to the vendor, or paid with his own cash subject to reimbursement. Routley participated in Respondent's relocation to Swan Island, which he viewed as a closing of the main Vancouver site. He recalled the transfer of equipment as requiring 4 or 5 loads on the flat bed truck.

For the period from his employment through August, Routley's hourly rate of pay was $13. After changeover to a computer-based payroll system in September, he was coded as level 1 foreman at $14.50 per hour.

c. *Other relevant evidence*

According to Anderson there were periodic meetings held by himself and Lundmark with the individuals in charge of work projects. Anderson identified those he meant as regularly being in attendance to be generally the 10 card signers, plus Richard Deegan, who was utilized in the painting of vessels more exceptionally than other journeymen. The meetings occurred just prior to the start of the day shift, and involved Respondent's executives explaining to those present what they wanted to have done, plus occasionally specifying just who as among the work force should be assigned to particular tasks. Of the group Anderson described as assembling in these instances, Canucci most vividly denied a recollection of ever having attended any ''production meeting'' of this kind.

Respondent provided life and medical insurance to its various officials and to key employees beginning in 1986. Mathieu was an exception to this coverage, and Routley does not show on the summary of participants because of just being newly added when a listing current for August was generated. Otherwise all the other card signers are shown as being covered by July with Farwest Insurance Co., and having their monthly premiums paid by Respondent. These programs were handled by office secretary Diana Santas, the person believed by employees also to be the payroll clerk in the time prior to relocation onto Swan Island. For reasons not disclosed both Lightfoot and Eubanks were discontinued from such coverage effective in August.

F. *Analysis*

1. Threshold conclusion

The principle of valid authorization cards being used to support a lawful grant of recognition by an employer to the labor organization so designated as a desired collective-bargaining representative is found in *Snow & Sons*, 134 NLRB 709 (1961), enfd. sub nom. *Snow v. NLRB*, 308 F.2d 687 (9th Cir. 1962). This case involved several issues in the context of loosely unfolding circumstances that led to a check of authorization cards claimed to be held by the union involved. The disinterested, impartial person performing this card check was a minister, who recorded for the parties that a majority of listed employees had designated the Union as claimed.

Holding that this process was sufficient to support an order to bargain, the Board noted that the card check represented a binding agreement expressly made by the employer and the later attempted repudiation was not challenging ''the accuracy or the propriety'' of what had been found. In further detailing events surrounding the card check this decision termed the process a ''signature'' check while the court's opinion expressly noted that the minister had ''compared the two sets of signatures'' using signed W-2 income tax forms in his undertaking.

The facts in *Waikiki Plaza Hotel*, 284 NLRB 23 (1987) are generally comparable to what occurred here. The *Waikiki Plaza* case involved parallel contract negotiations by two employers, in the midst of which a question concerning representation arose with regard to an independent union. In this context a hurriedly arranged card check took place as to each separate group of employees, and was carried out on one of the premises by an ordained minister. He considered employee lists furnished separately by each of the employers, and the independent union's authorization cards. After a brief hitch requiring the independent union to provide certain additional authorization cards for one of the bargaining units, the minister ''concluded that a majority was shown'' for both of them and signed a certification to that effect.

In a decision adopted by the Board, the view taken of these activities was stated as follows:

> The card check conducted by [the minister] was not of a character to establish majority representation being

> enjoyed by the [union] for the fundamental reason that no assurances were present of signatures to authorization cards being those of the individuals listed as being employed within the respective units.

In *Contemporary Guidance Services*, 291 NLRB 50 (1988), ''an impartial card check'' was desired between parties as to whom recognition of a union was at stake. Here another cleric was suggested but rejected, and a New York City attorney became the designated person ''to check the signatures.'' After establishing ''a method of *verifying signatures*'' [emphasis added], the impartial concluded that a majority of employees listed by the management had authorized the involved union to bargain for them.

Other cases in which the authentication of authorization cards was the issue, involved the precise activity of comparing known signatures to an exemplar. See *Heck's Inc.*, 166 NLRB 186 (1967); *Teamsters Local 707*, 196 NLRB 613 (1972); *Drackett Co.*, 207 NLRB 447, 451 (1973); and *Allied Products Corp.*, 220 NLRB 732, 734 fn. 4 (1975).

The foregoing array of authority convincingly establishes that the Board expects a determined effort in card check situations to assure that signatures on union authorization cards were in fact placed by the individual appearing with that name on a listing of employees. Were this not done the card check procedure would be illusory, because of regardless of how impartial, or dedicated, the third party might be, they simply have no basis to be satisfied that a cursive name-writing was necessarily done by the same actual person as is listed by an employer among its employees. In *Waikiki Plaza* this failing is what caused the controlling rationale to state that recognition ''was tainted from the outset,'' and I reach the same conclusion here. What Stratton actually certified to was a simple ability to read the English language and affirm that a typed list of names represented, almost in their total number, the same names as appearing in handwritten form. This is not a reliable basis on which to grant recognition, and by doing so Respondent has violated Section 8(a)(2) of the Act and derivatively Section 8(a)(1).

Should it subsequently be determined that the foregoing is not a valid basis of decision, I have for such a reason continued with the following analyses. These result in alternative and supplementary holdings to the effect that Respondent is also viewed as having violated Section 8(a)(2) on separate and independent grounds.

2. Substantial and representative complement issue

a. *Contentions*

The General Counsel and the Charging Party contend that Respondent knew full well it would expand dramatically in terms of its operations from after late July 1987, and the entire recognition dynamics involving Richard Stratton was merely an ''orchestrating'' of unlawfully granted recognition.

Respondent contends that several grounds exist for concluding that its work force in the last week of July was truly representative in terms of company history and business objectives at the time. First, Respondent notes that its level of employment had fluctuated considerably over the approximately 2 years of operations, as would be expected given the unpredictability of the ship repair business. Second, Respondent argues that any hopes for growth and prosperity that its officials harbored were simply uncertain of fulfillment. Here it is noted that little future work was assured, and the employees on the payroll in late July were actually working on repair jobs as a regular core of employees. It is also noted that the lease arrangement at Swan Island was tenuous, leaving Respondent no assurance that it could remain there. Respondent contends further that it had no reason to favor any bargaining relationship with OCAW. Contrarily it asserts that given the unsettled business changes of that summer, and uncommitted bank financing of its major equipment purchase, the recognition demand from Watts ''could not have come at a worse time.''

OCAW contends chiefly that this issue is controlled by *Fall River Dyeing Corp.*, 482 U.S. 27 (1987). Arguing generally from the holding in *Fall River*, OCAW points to the basic fluctuation of operations present in the ship repair industry, and that the retention of key employees during lull periods is both sensible and necessary. OCAW argues that only jobs actually secured should be relevant, and that even an aggressive bidding policy is without significance because it deals only with what is possible, not actual.

b. *Authorities*

The most appropriately stated test for premature recognition is whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal production. *Hayes Coal Co.*, 197 NLRB 1162 (1972). The Board specifically added in *Hayes Coal Co.* that a determination of premature recognition cannot be predicated on ''a possibility that future conditions may warrant an increase in personnel, or on the basis of an increase in personnel subsequent to the granting of recognition.''

In *Allied Products*, supra, an unlawful recognition of a union was prematurely extended when only 11 out of an ultimately anticipated 75 employees were employed, and these were engaged in preparatory work not in the nature of normal production.

In *R.J.E. Leasing Corp.*, 262 NLRB 373 (1982) a similarly unlawful recognition was extended when done on the basis of five employees, following which the work force immediately increased to 35, 93, and 150 within about a month. The opinion quoted from *Cowles Communications*, 170 NLRB 1596, 1610–1611 (1968), as follows:

> . . . where an employer recognizes a union as the exclusive bargaining representative of its employees on the basis of a majority demonstrated by cards or a petition, as here, such recognition is inappropriate and unlawful if it is granted before the employer has recruited a work force that can be considered substantially representative of his anticipated complement of employees.

See also *Bootlegger Trail*, 242 NLRB 1255 (1979).

In *Herman Bros.*, 264 NLRB 439 (1982), the Board found no violation in the granting of recognition where a prompt increase in the work force was ''unforeseen'' at the time. *Anaconda Co.*, 225 NLRB 953 (1976), also resulted in dismissal of a complaint alleging the Section 8(a)(2) violation of recognizing a union and signing a contract before there may exist ''a representative complement of job classifica-

tions and/or employees . . . because of the expanding nature'' of operations.

Fall River Dyeing, supra, relied on by Party to the Contract, was a successorship case, a category not well suited to determination of the narrower issue here, nor a theory claimed to be applicable by General Counsel. *Premium Foods v. NLRB*, 709 F.2d 623 (9th Cir. 1983), and *Aircraft Magnesium*, 265 NLRB 1344 (1982), also cited by OCAW, are again successorship issue cases not of sufficient materiality to the necessary resolution here. *Daniel Construction Co.*, 133 NLRB 264 (1961), extensively discussed in the OCAW brief, was a proceeding under Section 9(c) of the Act, and similarly neither relevant here nor relied on by General Counsel.

c. *Discussion*

Here there was not only substantial upward movement in the number of employees utilized for ship repair operations during 1987, but also a formalization from after September 1 of what had been so casually managed before. While no vessels were berthed for major repair during mid-to-late summer 1987, a definite business undercurrent was underway. As General Counsel correctly notes, the hiring of Kahler was a significant act in connection with the leasing, equipment auction, and financing dynamics going on simultaneously. Although it is true that mere possibilities are not to be given unjustified weight, the situation at the Portland Ship Repair Yard held every potential beyond mere speculation. The void created by DSR's elimination was bound to be filled in some appreciable way at this major maritime facility of the upper West Coast. Even allowing that WSI was also newly on the scene, and founded by a former chief executive of DSR, the business momentum was with Respondent. This arose both from their more established presence at the facility, and the fact that they attracted a more motivated group of experienced craft workers because of little or no association with the controversial memory of DSR's last years.

Respondent argues that the original lease was only temporary, however there is no indication that the Port, as lessor and a public entity, was interested in anything less than a full utilization of its premises, with Cascade General as the lead prospect. It is also conjectural that just as the $1.6 million worth of DSR assets were purchased; so too could they be resold if the level of business did not justify their retention. While this argument has a logic to it, the more realistic view is to say that such an audacious step would only be undertaken with a serious intent at business growth. Finally the necessary bank loan to permit this integrated positioning of business capacity was comfortably anticipated, until only the last-minute crisis led to a resourceful alternative.

In more direct relation to the legal doctrine involved, the representative jobs existing would militate in favor of the legitimacy of OCAW's recognition. While there are certain fringe functions such as the internal machinist who can produce for general industrial customers, and operating engineers, about which little was developed in the record, the work force during the retrenched pay periods of late July were still practically a total cross-section of trade skills needed for ship repair work. What is dramatically different is the increase in personnel that occurred so swiftly after the key date of September 1 had passed. Noting that this was the time of formal reincorporation, and that Brawley had astutely shadowed the evolving circumstances all summer long to ultimately become Respondent's consultant and then primary financial officer, I believe that operations were neither normal nor substantially so when OCAW was recognized promptly and unquestioningly after the Stratton card check. Given these circumstances, I do not believe the facet of *Hayes Coal* stating that purely an increase in personnel does not denote unrepresentiveness is a controlling point.

It is also notable that Anderson, contrary to his attempt to depict things otherwise, practically embraced Watts' purposes. Respondent had known long in advance of MTC-oriented representational interests as to its employees, both from Fahey's dealings and from a much earlier letter of Plympton dated in 1986, alluding to ''the possibility of Cascade General obtaining a Union Contract.'' With this background, and given Anderson's matured, and diverse business experience, he could not have failed to understand that his company was a temptation to those in the labor movement. When these factors are weighed against his testimony that he did not understand the card check proceedings, and that he executed a recognition statement to OCAW without having any particular reason to do so, it seems even more plain that Anderson was looking ahead to burgeoning operations, and possessed of an intention not to have dealings with MTC as had contributed so traumatically to the closure of DSR.

D. *Holding*

Accordingly, I find the increase of employees, particularly when the 16 employed in the workweek of July 31 are compared with the 400 on Respondent's payroll in November, makes it sufficiently plain that a representative complement was not in Respondent's employ at the time of the recognition based on a card check. On this basis I find there is the separate and independent reason to hold that Respondent violated Section 8(a)(2) as basically alleged in this case.

3. Conclusions regarding alleged statutory supervisors

a. *Contentions*

General Counsel originally contended that all 10 card signers were statutory supervisors, however a concession appears in the brief to the effect that ''the record is insufficient to establish that Robert Lindsay is a statutory supervisor.'' Other than this General Counsel, with the Charging Party's concurrence, contends that the remaining nine individuals all exercised at least one of the disjunctive functions of a statutory supervisor as defined in Section 2(11) of the Act, and exhibited other secondary indicia of such authority.

In its contrary view on the issue, Respondent argued that supervisory status had not been established for any of the individuals at the particular time when they signed the OCAW authorization card. Respondent observed only that even with all doubts resolved in favor of General Counsel's allegation, the most shown was indistinct and minor examples of a supervisory function. The testimony of Bolton was cited to exemplify this, insofar as he described the machinist function as one where 90 percent of the time all those in the craft, meaning to include Gardner and DeSerrano, were simply an indistinguishable team working with the tools.

OCAW contended that for certain limited periods of time a leadman capacity was established for some of those at issue, but this did not meet statutory criteria to show super-

visory status. In further development of its arguments, OCAW only briefed the supervisory status issues relative to Routley, Canucci, Van Domelen, Mathieu, Bolton, and DeSerrano.

b. *Credibility*

The evidence concerning this branch of the case is extensive and often contradictory. Thus as to episodes and the true nature of workplace happenings it is vital to assess the credibility of those offering testimony on the issues.

I am generally persuaded to believe General Counsel's early witnesses, for Morace, Enzenbach, Blake, Johnson, and Ramage all exhibited a convincing demeanor. In each case, and to a sufficient extent, they each appeared earnest in recounting what they had experienced, and the true nature of how operations were achieved in this dispersed setting.

As among the remaining rank-and-file witnesses for this issue, actually those whose status was at issue, I credit Van Domelen and Bolton in particular as to their actual roles in the process and that of their colleagues. The witnesses I specifically discredit, where their testimony gives rise to a conflict, are Canucci and Eubanks, both of whom impressed me as vague, evasive, and lacking in conviction as to what they described.

Anderson is also a witness I discredit, and here the rejection of his testimony on this and other issues of the case is quite emphatic. Anderson exhibited almost a studied unconcern for the accuracy of what he was saying, and I find little of value in his testimony, other than as background, chronology, and superficial recounting of events.

c. *Guiding case authority*

In *Spring Valley Farms*, 272 NLRB 1323 (1984), the Board closely analyzed the duties of a feed delivery manager, holding that a broad, nonroutine and responsible discretion was possessed by her as to the hours worked and earnings realized by a group of drivers. The Board specifically explained its holding as based on the principle that possession of any disjunctively stated type of statutory authority listed in Section 2(11) of the Act was sufficient to confer the status of a statutory supervisor on such a person. As appropriate to this case *Rose Metal Products*, 289 NLRB 1153 (1988), holds that where a senior metal working employee assigns work order tasks among six to eight others, considering their skill and availability in the process, transfers work between them, and corrects their flaws, he is a statutory supervisor even though spending a minimum of 80 percent of his own time performing unit work.

Respondent cites case authority for seasonal industries in which a 50 percent rule, determined by the facts of a complete 1 year period, establishes the inclusion or exclusion of persons within a bargaining unit. *Great Western Sugar Co.*, 137 NLRB 551 (1962). Respondent's other citation on this issue, *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970), is uniquely limited to a highly structured work setting of salaried employees possessing a mechanical engineering degree, or its equivalent, for which the Board fashioned a special ''50% formula'' as to supervisory issues arising from facts of the case.

In *Security Guard Services v. NLRB*, 384 F.2d 143 (5th Cir. 1967), enfg. 154 NLRB 8 (1965), the court closely analyzed the true meaning of ''independent judgment'' in the course of one person in a work force directing the efforts of others. The court emphasized that to reach the level of an activity contemplated by Section 2(11) of the Act, there must be an assured vigor and substance to directives given, not a mere acting as intermediary or serving in a role where the authority to command is more illusory than real.

d. *Discussion*

1. Functional significance

For the most part the individuals at issue were the hands-on cadre for this ship repair enterprise. Except for Routley, all others persevered with Respondent through the eventful first half of 1987, and in apparent recognition of their efforts were propelled into formal positions of authority when Respondent underwent its extensive upsurge in business later that year. By then Lightfoot and Mathieu were both well-entrenched in their respective roles, and the shake-out of authority as between the Canucci–Van Domelen and Gardner–DeSerrano duos was a settled reality.

The roles of Krug, Rohde, Bittner, and Way, from the limited evidence as to them, were such that management direction and control emanated only at sporadic, focused times from each of them. However the key names in higher management remained Anderson and Lundmark, and they plainly exercised this authority over the months of 1987 preceding Kahler's hiring.

In generalizing about the situation I am convinced that a sufficient need for supervisory oversight and direction, to be both authoritative and frequent in its exercise, was present for all the crafts. In general, therefore, I conclude that the three persons frequently named as supervising the principal craft of machinist, and, except as determined below, the other ''craft heads'' were instrumental in effectiveness of overall, combined operations. It must be remembered that Kahler did not arrive until well into mid-summer, and he was immediately enmeshed in the several administrative concerns of the business at that time. Finally, a point not touched on in the arguments, but one of considerable importance to me, is the fact that Lundmark, perhaps the most completely versed of Respondent's officials in ship repair work, took sporadic business trips to Japan approximately around July, thus diluting the supervisory scheme and calling more on the residual authority of the craft heads during that significant period.

2. Application of Section 2(11)

Section 2(11) of the Act reads:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Based on the facts of this case, and settled Board doctrine as to resolving first-line supervisory issues, it is established from the evidence that Gardner, DeSerrano and Bolton each

claimed, possessed and exercised authority to effectively direct others of their craft by the use of independent judgment rooted in their skills and experience. I find the same to be true as to Lightfoot, Van Domelen, Canucci, Mathieu and Eubanks, for in each of these cases the manifestation differed only in frequency and degree, but not in its essential significance.

3. Secondary indicia

On the basis of several admissions of having attended production meetings, the spontaneous agreement by Anderson that these did take place with the respective craft heads, and discrediting Canucci's contrary denial, I note first that this is a secondary factor influencing any definitive conclusion on the point. The white hat wearing also militates this way, as does the permission of these specially recognized employees to park their vehicles inside the security perimeter of the shipyard when reaching work. Further, there was accepted evidence that the three men overseeing machinists regularly used a desk within a trailer spotted at the Swan Island premises. Finally, the group at issue is largely set apart by reason of their insurance coverage. This fringe benefit signifies with some impact that Respondent considered them as special individuals in the business scheme.

4. The OCAW meetings

On the afternoon of July 27, and with Anderson's permission to do so during working hours, Watts conducted a meeting of employees to solicit their authorization for collective-bargaining representation. This occurred at the Vancouver facility, where the entire work force was present. Lightfoot informed them all about attending, and as the group assembled to hear Watts they were also joined by Rohde. Watts opened the meeting by asking that any supervisors excuse themselves, and on this Rohde departed. Watts proceeded to describe the benefits of his organization, and on concluding the entire group of 10 persons present each signed a typical authorization card for OCAW.

These became the cards supplied to Cramer for his card check meeting 4 days later, following which he returned them to Watts at OCAW's Richland, Washington office. Still later these cards were submitted by OCAW to the Board as intervention in the MTC-generated representation petitions.

On September 24 Watts held ratification meetings with employees now at the Swan Island location of Respondent. A secret ballot procedure was followed, leading to unanimous ratification of the contract reached between OCAW and Respondent.

5. The whiting-out

The trial involved consideration of the fact that seven of the OCAW authorization cards bore ''white-out'' opaquing over the line for a statement of the signer's classification. White-out is the brushed on fluid that quickly dries to a covering crust on paper.

The whiting-out had been directed be done by Watts after the July 31 card check. Testimony of Federal Bureau of Investigation document examiner Gary Kanaskie established that on an official request these whited-out cards long in the possession of NLRB Subregion 36 were sent to Washington, D.C. and examined there at the FBI laboratory. Kanaskie testified that by use of lighting enhancement, chemical and photographic procedures he was able to determine in all but one case that the obscured classification entry was the word ''Foreman.''

e. *Holding*

The overall evidence on the supervisory issue of the case shows that most of the persons in question did possess, and had regularly exercised, the authority to responsibly direct work of others at times preceding, and in effect on, July 27 and July 31. The preponderance of secondary indicia in the case, involving habitual wearing of white hats as emblematic of supervisory status in a ship repair facility, confirms and supports the chief outlook above. Further, the candid entry of the term ''Foreman'' when executing OCAW authorization cards indicates this as the view most of the individuals held of themselves.

On this basis I conclude that Lightfoot, Van Domelen, Canucci, Gardner, Bolton, DeSerrano, Mathieu, and Eubanks were at times material to this case supervisors as defined in Section 2(11) of the Act. The evidence is insufficient to reach the same conclusion as to Routley, for this individual had infrequent contact with other employees. His participation in a driving caravan for a brief Alaska project was not indicative of supervisory status, and until his new designation in September he functioned essentially as an unclassificable employee experienced in materials, transportation and general ''trouble-shooting.'' No contention remains that Lindsay was a supervisor, and the record would not support that conclusion in any event.

On this basis I find that the recognition extended by Respondent to OCAW was again on a separate and independent ground violative of Section 8(a)(2) of the Act, because of the near-complete involvement of supervisors. The apparent bargaining relationship is for this reason void at its inception.

CONCLUSIONS OF LAW

1. Respondent Cascade General is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil Chemical and Atomic Workers Local 1-369, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By recognizing OCAW, by executing a collective-bargaining agreement with it, and by maintaining in effect and enforcing the provisions of said contract, which contained union-security and dues-checkoff provisions, Respondent has rendered, and is rendering, unlawful assistance and support to OCAW, and has interfered with, restrained, and coerced and is interfering with, restraining, and coercing its employees in the exercise of Section 7 rights in violation of Section 8(a)(1) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent

to withdraw all recognition from OCAW as representative of its employees for purposes of collective bargaining in the appropriate unit herein, unless and until OCAW has been duly certified by the National Labor Relations Board as the exclusive representative of such employees. I shall also order Respondents to cease giving force and effect to the collective-bargaining agreement executed on September 24, or any renewal, modification, or extension thereof; provided, however, that nothing in the Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to those agreements.[10] In addition, I shall order Respondent to reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys which may have been exacted from them by, or in behalf of, OCAW. The latter requirement is a remedial measure serving to restore to Respondent's employees sums involuntarily withheld pursuant to the checkoff provision in an unlawfully executed and maintained collective-bargaining agreement or as accepted directly by OCAW. See *NLRB v. Forest City/Dillon-Tecon Pacific*, 522 F.2d 1107 (9th Cir. 1975); *R.J.E. Leasing Corp.*, supra; *Special Service Delivery*, 259 NLRB 993, 994 and cases cited (1982); and *Hudson River Aggregates*, 246 NLRB 192 (1979). General Counsel's further remedial requests are denied.

Disposition[11]

On these findings of fact and conclusions of law and on the entire record,[12] I issue the following recommended[13]

ORDER

The Respondent, Cascade General, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting or contributing support to the OCAW by recognizing or bargaining with such labor organization as representative of its employees for the purpose of collective bargaining unless and until OCAW is certified by the National Labor Relations Board as the exclusive representative of such employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any force and effect to the collective-bargaining agreement between Respondent and OCAW dated September 24, 1987, or any renewal, extension, modification or supplement thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms or conditions of employment which may have been established pursuant to those agreements.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from OCAW as the exclusive collective-bargaining representative of its employees unless and until it has been duly certified by the National Labor Relations Board as the exclusive representative of their employees in an appropriate unit.

(b) Reimburse all former and present employees for all initiation fees, dues, assessments and other moneys, if any, withheld from or paid by them, in the manner provided in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Portland, Oregon facility, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] As described in sec. II,C,2, of this decision above, the Party to the Contract has already renounced any current interest in representing employees of this employer. While this disclaimer is noted, its full confirmation becomes a compliance matter.

[11] The motions to reopen record made by Respondent and OCAW are now denied.

[12] The official reporter has included a R. Exh. 4 in the record of this case by adding it in a separate exhibit jacket dated June 2, 1989. In fact this exhibit was identified only during the trial, but never successfully introduced or admitted into evidence.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''